WRONGFUL DEATH DAMAGES: RECOVERY OF INVESTMENT IN AND SOCIETY AND COMPANIONSHIP OF A CHILD

Currie v. Fiting
375 Mich. 440, 134 N.W.2d 611 (1965)

The parents of twenty-one year old Linda Kay Hopkins recovered damages for the loss of her society and companionship when she died as a result of an automobile collision.[1] The trial court awarded the parents 32,788.32 dollars even though they were not dependent on their daughter for contributions to the family income.[2] Both parties appealed, and the supreme court, following *Wycko v. Gnodtke*,[3] affirmed the judgment for loss of society and companionship but remanded on the grounds that the jury should have considered the cost of raising the child as an additional element of damages.[4]

Wrongful death statutes may be classified into three categories with reference to recovery for the loss of society and companionship of a child:[5] (1) statutes expressly allowing relief;[6] (2) statutes allowing damages which are fair and just and under which jurisdictions have split in permitting recovery;[7] and (3) statutes expressly limiting damages to pecuniary loss.[8]

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[1] Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965). The action was brought under Mich. Stat. Ann. § 27A.2922 (1961).

[2] Currie v. Fiting, *supra* note 1. The court awarded $3,147.14 funeral expenses, $1,000 per year for the average life expectancy of the parents for loss of society and companionship, and $3,131.18 interest from the time of the accident.

[3] 361 Mich. 331, 105 N.W.2d 118 (1960), 22 Ohio St. L.J. 442 (1961).

[4] "In the search for the elements of a particular life a jury might consider expenses of birth, of food, of clothing, of medicines, of instruction, of nurture, and shelter . . . ." Currie v. Fiting, *supra* note 1, at ——, 134 N.W.2d at 616.

[5] See generally Annot. 74 A.L.R. 11 (1931).

[6] Hawaii Rev. Laws § 246-2 (1955); Kan. Gen. Stat. Ann. § 60-1904 (1964); Nev. Rev. Stat. § 41.090(a) (1963); Wis. Stat. Ann. § 331.04(4) (1958); Wyo. Stat. Ann. § 1-1066 (1957).

[7] States which permit recovery for society and companionship: Wilson v. City & County of San Francisco, 106 Cal. App. 440, 235 P.2d 81 (1951); McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953), although not expressly allowing recovery for loss of society, the court said, " 'As matter of sentiment, life has no pecuniary value, but considered with reference to the *relations of deceased with others*, it is capable of such estimate.' " (Emphasis added.) *Id.* at 465, 263 P.2d at 315; Complete Auto Transit, Inc. v. Floyd, 249 F.2d 396 (5th Cir. 1958) (privilege of having the deceased with them in the home was an element which the jury could consider); City of Fairburn v. Clanton, 102 Ga. App. 556, 117 S.E.2d 197 (1960) (impliedly permits recovery by holding that dependency on the child is no longer a condition precedent to the parent's recovery); Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952); Roby v. Kansas City So. Ry., 130 La. 896, 58 So. 2d 701 (1912); Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956); Spangler v. Helm's New York-Pittsburgh Motor Express, 396 Pa. 482, 153 A.2d 490 (1959); Simons v. Kidd, 73 S.D. 368, 42 N.W.2d 307 (1950); Meads v. Dibblee, 10 Utah 2d 229, 350 P.2d 853 (1960); Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S.E. 269 (1896); Davis v. North

Prior to 1960 the states in the third category uniformly refused to allow a parent to recover for loss of society and companionship since it was thought not to be a pecuniary loss;[9] but in that year the Michigan Supreme Court, in *Wycko v. Gnodtke*,[10] supplemented the traditional measure of damages[11] by holding that the loss of society sustained by a parent as a result of a child's death was a pecuniary loss.

Since *Wycko*, a few states with statutes similar to Michigan's[12] have decided the same issue with varying results.[13] Ohio and Illinois, instead of expressly allowing recovery of the loss of society, have created a presumption of a pecuniary loss when a close family relationship is disrupted by the loss of a member.[14] In applying this presumption, these states have experienced a lack of uniformity, a problem which might be largely overcome by expressly recognizing society and companionship as the loss being compensated.[15]

Coast Transp. Co., 160 Wash. 576, 295 Pac. 921 (1931).

States refusing recovery for society and companionship: Hahn v. Moore, 127 Ind. App. 149, 133 N.E.2d 900 (1956); Agricultural & Mechanical Ass'n v. State, 71 Md. 86, 18 Atl. 37 (1889); Acton v. Shields, 386 S.W.2d 363 (Mo. 1965); Liston v. Reynolds, 69 Mont. 480, 223 Pac. 507 (1924), held that the jury failed to heed an instruction not to consider loss of companionship as an element of damage, but Mize v. Rocky Mountain Bell Tel. Co., 30 Mont. 521, 100 Pac. 971 (1909), allowed companionship in the husband and wife relationship; *but see* Henessey v. Burlington Transp. Co., 103 F. Supp. 660 (D. Mont. 1950), which allowed recovery for loss of society to a parent; Kalsow v. Grob, 61 N.D. 119, 237 N.W. 848 (1931); Steiskal v. Darrow, 55 N.D. 606, 215 N.W. 83 (1927); National Tank Co. v. Scott, 191 Okla. 613, 130 P.2d 316 (1942) (limits recovery to pecuniary loss and says society is not such a loss); Banker v. McLaughlin, 200 S.W.2d 699 (Tex. Ct. App. 1947).

[8] Ark. Stat. Ann. § 27-909 (1947) (allows recovery for mental anguish of a parent but implies no recovery for companionship by anyone other than a spouse); Ill. Ann. Stat. ch. 70, § 2 (Smith-Hurd 1959); Mich. Stat. Ann. § 27A.2922 (1961); Minn. Stat. Ann. § 573.02 (Supp. 1964); Mo. Ann. Stat. § 2552 (1964); Neb. Rev. Stat. § 30-810 (1964); N.J. Stat. Ann. § 2A:31-5 (1952); N.Y. Deced. Est. Law § 132; N.C. Gen. Stat. § 28.174 (1950); Ohio Rev. Code Ann. § 2125.02 (Page 1954); Vt. Stat. Ann. tit. 14, § 1492(b) (1958).

[9] Nelson v. Lake Shore & M.S. Ry., 104 Mich. 582, 62 N.W. 993 (1895); Tilley v. Hudson River R.R., 24 N.Y. 471 (1862); Kennedy v. Byers, 107 Ohio St. 90, 104 N.E. 630 (1923). See also Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913).

[10] *Supra* note 3.

[11] The traditional measure was the "net present value, after deducting the probable cost of rearing the child, of services which it was reasonably to be expected that the child would have been capable of rendering to the parents." McCormick, Damages § 101, at 352 (1935). For a criticism of this method of "bloodless bookkeeping," see Wycko v. Gnodtke, *supra* note 3.

[12] See statutes cited at *supra* note 8.

[13] *Accord*, Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961); *contra*, Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Fornaro v. Jill Bros., 42 Misc. 2d 1031, 249 N.Y.S.2d 833 (1964).

[14] Hall v. Gillins, 13 Ill. 2d 26, 147 N.E.2d 352 (1958); Immel v. Richards, 154 Ohio St. 52, 93 N.E.2d 474 (1950).

[15] Carr, "Measuring Damages in the Family Context," 1962 U. Ill. L.F. 574, at 576

Society and companionship, although not clearly defined by the cases, is probably best described as a family interest.[16] In order to measure the loss of this interest which cannot be assessed exactly,[17] the courts have admitted evidence of the following factors: the number of children in the family,[18] whether the family was close,[19] the age of the child,[20] the age of the parents,[21] whether the child lived with the parents,[22] and the disposition of the deceased.[23] The end result, however, is that each case must be decided on its own facts and circumstances.[24]

In *Currie* it was argued that since Linda was an adult there could be no recovery by her parents for loss of society and companionship.[25] The fallacy of this argument is demonstrated by the fact that the pecuniary value of the society of a minor who has left his parents might well be less to the parents

states: "The presumption was originally created for application in cases where minor children were killed and no proof of earning capacity could be shown. But today, even in these cases, the courts do not apply the presumption uniformly."

[16] Carr, *supra* note 15, at 574. See also Wycko v. Gnodtke, *supra* note 3, where the court said: "[S]o an individual member of a family has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and protection, in a word companionship." See Holder v. Key System, 88 Cal. App. 2d 925, 200 P.2d 98 (1948).

[17] Wycko v. Gnodtke, *supra* note 3.

[18] Reisig v. Klusendorf, 375 Mich. 519, 134 N.W.2d 634 (1965) (sole heir); Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965) (only child).

[19] Parsons v. Easton, 184 Cal. 764, 195 Pac. 419 (1921); Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965).

[20] Cook v. Clay St. Hill R.R., 60 Cal. 604 (1882); Griott v. Gambin, 194 Cal. App. 2d 577, 15 Cal. Rptr. 228 (1961).

[21] Ure v. Maggio Bros. Co., 32 Cal. App. 2d 111, 89 P.2d 436 (1939).

[22] Powers v. Sutherland Auto Stage Co., 190 Cal. 487, 213 Pac. 494 (1923); Munro v. Pacific Coast Dredging Co., 84 Cal. 515, 24 Pac. 303 (1890); Griffey v. Pacific Elec. Ry., 58 Cal. App. 509, 209 Pac. 45 (1922); Reisig v. Klusendorf, 375 Mich. 519, 134 N.W.2d 634 (1965) (unmarried adult son residing with his parents); Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965) (daughter living at home when not at school); Straub v. Schadeberg, 243 Wis. 257, 10 N.W.2d 146 (1943). The *Straub* case held that even though the boy was in the custody of the mother, where the father and the boy were friendly and the father had the right to see the boy, the father was allowed to recover for the loss of his son's society.

[23] Davis v. Tanner, 88 Cal. App. 67, 81, 262 Pac. 1106, 1112 (1927), held no error for the trial judge to instruct that the jury might consider "the disposition of said Harvey D. Davis as to whether it was kindly and affectionate or otherwise." See Gulf Ref. Co. v. Miller, 153 Miss. 741, 749, 121 So. 482, 484 (1929), which held it was not error to show that this "lovable" boy was "the pride of his father, the joy of his mother, the idol of his sisters, and the boon companion of his brothers;" Van Cleave v. Lynch, 109 Utah 149, 166 P.2d 244 (1946) (affectionate). See also Beeson v. Green Mountain Gold Mining Co., 57 Cal. 20 (1880): "We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were . . . circumstances . . . for the jury to take into consideration in estimating what damages would be just . . . ." *Id.* at 39.

[24] Griott v. Gambin, 194 Cal. App. 2d 577, 15 Cal. Rptr. 228 (1961).

[25] Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965) (dissenting opinion).

than that of a child of twenty-one who has always lived with her parents. Age should merely be a factor to be considered with others in assessing the amount of the loss and not a factor that precludes recovery.[26] Other circumstances were present in *Currie* to show the existence of society and companionship,[27] and the court properly allowed its recovery.

Currie was remanded because the trial court failed to consider the parents' investment in the child as an element of damages.[28] Loss of investment, a new element of wrongful death damages, was derived from the words of Justice Smith in *Wycko v. Gnodtke*,[29] and the *Wycko* court seems willing to permit investment recovery along with recovery for loss of society and companionship and loss of contributions under the traditional measure of damages.[30] There were two theories of compensation upon which the court could have based the recovery of the parents' investment: (1) that the amount of the parents' investment in the child was evidence of the replacement cost of the child, or (2) that the pecuniary value of the child at the time of death was best represented by the total amount of money expended by the parents on the child from her birth to her death. Both theories were argued by the plaintiff,[31] but the court's opinion does not indicate which one was selected.

Under the replacement cost theory one must first determine whether the child is to be replaced by an infant or by another child the same age. If replacement is by an infant, then the measure of damages may be analogized to that in cases involving the destruction of perennial crops,[32] *i.e.*, the cost of raising the infant to the age of the deceased child plus the loss of contributions sustained by the parents before the infant attains that age. Logically, under this theory there should be no recovery for the loss of future society and companionship of the deceased child as the new child will provide society to

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[26] "Why age 21 should set up a magic barrier baffles understanding in view of the total omission from the statute . . . ." Currie v. Fiting, 375 Mich. 440, ——, 134 N.W.2d 611, 615 (1965).

[27] Linda Kay Hopkins (1) was an only child, (2) was loving and affectionate toward her parents, (3) lived at home with her parents when not at school, and (4) was not yet 22.

[28] Currie v. Fiting, 375 Mich. 440, ——, 134 N.W.2d 611, 616 (1965).

[29] See Wycko v. Gnodtke, 361 Mich. 331, 339, 105 N.W.2d 118, 122 (1960), where Justice Smith stated: "Just as with respect to a manufacturing plant or industrial machine, value involves the costs of acquisition emplacement, upkeep, maintenance service, repair, and renovation, so, in our context, we must consider the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture and shelter." See generally Weinstein, "Jury Verdicts—Excessive or Inadequate," 39 Mich. S.B.J. 11 (1960); Comment, 54 Nw. U.L. Rev. 254 (1959).

[30] The court stated: "Finally if, in some unusual situation, there is in truth, or reasonably forthcoming, a wage-profit capability in the infant (an expectation of an excess of wages over keep, the measure heretofore employed) the loss of such expectation should not be disregarded as one of the pecuniary losses suffered." Wycko v. Gnodtke, 361 Mich. 331, 340, 105 N.W.2d 118, 123 (1960).

[31] Brief for plaintiff, pp. 47-49, Currie v. Fiting, *supra* note 28.

[32] McCormick, Damages § 126 (1935).

the parents just as the deceased would have, although there may be recovery for any difference in value of the society and companionship.

If the replacement is to be by a child of the same age as the deceased, the cost of replacement is merely the adoption costs of the new child. The new child can now provide both future contributions and future society and companionship in place of the deceased, and thus the parents have suffered no loss of these prospective benefits.

If the court adopted the second theory, the assumption must have been that the pecuniary value of the child was the amount of money invested in her by her parents up to the time of her death. Value, as used here, could not have been a market value, but rather it must have been the value of the child to her parents. The recovery under this theory may be analogized to the recovery for the destruction of personal property where market value is, for some reason, inappropriate, and an elastic notion of value to the owner is used.[33] In those cases "evidence of the original cost to the plaintiff, of the amount which it would cost to replace the property, together with evidence of the extent and the time . . . of the loss or injury, would be pertinent to be considered."[34] The combined recovery of the investment, future contributions, and future society and companionship cannot be justified under the second compensation theory. This recovery would amount to allowing the parents the entire present value of their investment while at the same time allowing them to enjoy the prospective benefits of that investment.

Apparently the court was attempting to remedy the inadequacy of past awards under the traditional measure of damages which allowed recovery of little more than burial expenses in many cases and, thus, made it cheaper to kill a child than to injure him.[35] In order to achieve this objective, the court is willing to permit the simultaneous recovery of investment, future society and companionship, and future contributions. However, to allow parents to recover their entire investment while at the same time allowing them to enjoy the prospective benefits of that investment is to permit a double recovery. The recovery of investment ought to be an alternate remedy to the recovery of prospective benefits, *i.e.*, the recovery of one ought to preclude the recovery of the other. On either of the above investment theories the court's remand to consider loss of investment appears inconsistent with its affirmance of the judgment for the loss of society and companionship.

Query, however, whether instead of looking at the result as inconsistent

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[33] *Id.* § 45.

[34] *Id.* § 45, at 171.

[35] See Currie v. Fiting, 375 Mich. 440, ——, 134 N.W.2d 611, 612-13 (1965), where the court said: "[T]his Court has steadily moved away from the proposition—from which Justice Smith recoiled in that case—that the value of the life of a child or of any human being is such that there can be a recovery for funeral expenses and nothing more." See also Courtney v. Apple, 345 Mich. 223, 76 N.W.2d 80 (1956). Although recovery of a parents' investment will result in larger awards under either of the theories, it is obvious that the death of a rich man's child will result in a greater recovery than the death of a poor man's child.

with the theory, it would be more in line with the intent of the court to look only at the result and disregard the analogy it uses. It is true that the result is inconsistent when analogized to the recovery of damages for loss of property, but can Linda Kay Hopkins be analogized to a machine, perennial crops, or any other piece of property? Is this court saying that lawyers ought to rid themselves of the traditional ideas of valuation based on replacement cost or recovery of investment? Is it saying that our society places values on human life that forbid an analogy of human life to items of property? If so, the court may also be saying that the measure of the value of the life of a child to the parent is what it cost to get the child where she was at death plus what she might have repaid her parents in love and affection and money in the future. Such a theory represents a complete break from traditional legal notions of damages and is sure to result in larger awards in Michigan as well as other states which may adopt such a theory. The result represents liberality in recovery of damages far beyond the recovery allowed even under statutes considered to be much more liberal than Michigan's.[36]

[36] Of all the statutes discussed above [see notes 8-10 *supra*], that of Michigan and of states having similar statutes seem to be the most restrictive as to recovery of damages for wrongful death, limiting it to pecuniary loss.